94544-6

(COA 34018-0-III)

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF

EDDIE D. ARNOLD

SUPPLEMENTAL BRIEF OF PETITIONER

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I. ISSUES PRESENTED

1. Whether the crimes of statutory rape are offenses for which one must register as a sex offender, where those crimes were codified prior to July 1, 1976, and therefore, fall within 9.94A.030's definition of "sex offense?"

2. Whether the doctrine of horizontal stare decisis applies to Washington's court of appeals when that doctrine may preclude legitimate disputes in the law from reaching this Court's review?

II. STATEMENT OF THE CASE

On June 28, 1988, the defendant pled guilty as charged to one count of second degree statutory rape in violation of former RCW 9A.44.080(1) (1979). *Matter of Arnold*, 198 Wn. App. 842, 844, 396 P.3d 375 (2017). Thereafter, he was convicted of failing to register as a sex offender on five separate occasions. *Id.*

The State again charged the defendant with the current charge of failing to register as a sex offender, alleging that between May 2013 and October 2013, the defendant failed to comply with RCW 9A.44.130. *Id.* at 845. In 2015, the defendant pled guilty as charged. *Id.* Two weeks after the defendant was sentenced, on June 17, 2015, the Spokane County Sheriff's Office sent the defendant a letter indicating that he was no longer required to register as a sex offender pursuant to *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011). *Id.* The defendant moved to withdraw his guilty plea, alleging that he was unaware of *Taylor*. *Id.* The trial court transferred the

matter to Division Three of the Court of Appeals as a personal restraint petition. *Id*.

Applying the principle of "horizontal stare decisis," two of the three reviewing judges declined to deviate from Division One's holding in *Taylor*, and Division Two's analogous holding in *In Re Personal Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015), despite their opinion that the "State's argument [that those cases were wrongly decided] has much force." *Id.* at 846. The three-judge panel authored four separate opinions. Judge Pennell's concurring opinion to Judge Pennell's majority opinion expounded on the principle of "horizontal stare decisis" and its role in court of appeals' decisions. *Id*. at. 851-855. In a separate concurrence, Judge Siddoway indicated that horizontal stare decisis requirements do not apply to the court of appeals, but that, in this case, "justice is best served by deciding this case consistently with *Taylor* and *Wheeler*," expressing her concern that harm would ensue if Division Three decided the issue differently than the other divisions. *Id.* at 855. Judge Lawrence-Berrey dissented, accepting only for the purpose of his dissent that the majority's stare decisis rule for the court of appeals was correct, and determined that *Taylor* and *Wheeler* were *both* incorrect and harmful. *Id.* at 855-863.

The Commissioner of this Court granted the State's motion for discretionary review on both the statutory interpretation issue and the issue

of whether and to what extent horizontal stare decisis applies to Washington State Court of Appeals decisions. Corrected Ruling Granting Rev. (October 3, 2017).

III. ARGUMENT

In 2011, Division One of the Court of Appeals decided *Taylor*, and reversed the defendant's conviction for failure to register as a sex offender, reasoning that the defendant's prior criminal conviction for third degree statutory rape was no longer listed as a "sex offense" under Washington law. In 2015, Division Two agreed in *Wheeler*. Both courts erred in failing to recognize that the crimes of statutory rape were codified and in effect prior to July 1, 1976, and, therefore, fall within the registration requirements of RCW 9.94A.030(47)(b). By their oversight, Division One and Division Two created an unintended loophole in Washington's sex offender registration statutes.

In *Arnold*, a panel of Division Three agreed that *Taylor* and *Wheeler* were likely incorrect, but declined to expressly disagree with those rulings under the doctrine of "horizontal stare decisis." This doctrine has been inconsistently applied in the Court of Appeals; that court and legal practitioners are in need of a workable and consistent standard that allows our intermediate appellate courts to disagree with one another, while still acting with deference to precedent.

A. THE *TAYLOR* AND *WHEELER* COURTS' ERRONEOUS INTERPRETATION OF WASHINGTON LAW CREATED A LOOPHOLE IN THE SEX OFFENDER REGISTRATION STATUTE THAT DOES NOT EXIST.

1. Standard of Review.

The meaning of a statute is a question of law reviewed by the court de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). A court's purpose in construing a statute is to determine and effectuate the intent of the legislature. *Id*.; *Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 961, 275 P.3d 367 (2012). "The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning." *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal quotation omitted). To make this determination, the court looks to the text of the statutory provision, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Id*. One well-settled principle of statutory construction is that no portion of the statute should be rendered meaningless or superfluous. *See, e.g., State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

2. The Sex Offender Registration Statute Unambiguously Requires Offenders Convicted of Second Degree Statutory Rape to Register.

Before the 1975 adoption of the new criminal code under Title 9A, the crimes of statutory rape were codified in former RCW 9.79.200 (First

Degree), former RCW 9.79.210 (Second Degree), and former RCW 9.79.220. Laws of 1975, 1st Ex. Sess., ch. 14, §§7-9, 10(2). The effective date of these laws was September 8, 1975. *See* Laws of 1975, p ii (Effective Date of Laws). The Legislature enacted the Washington Criminal Code in Title 9A, effective July 1, 1976. Laws of 1975, 1st Ex. Sess., ch. 260.

In 1979, the legislature "decodified" the statutory rape laws and recodified them in Title 9A as RCW 9A.44.070 - .090. Laws of 1979, 1st Ex. Sess., ch. 244, §§4-6, 17-19. Former RCW 9A.44.080 (1979), second degree statutory rape, provided:

> (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.
>
> (2) Statutory rape in the second degree is a class B felony.[1]

In 1988, the legislature "repealed" the statutory rape laws and simultaneously enacted RCW 9A.44.073, 9A.44.076 and 9A.44.079, Washington's child rape statutes. Laws of 1988, ch. 145, §24.[2] The

[1] Former RCW 9.79.210 (1975) was substantively identical to the 1979 version of the statute.

[2] The 1988 version of rape of a child in the second degree provided:

> (1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old, but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

legislature described this change as a "renaming" of the offenses. H.B. REP. on H.B. 1333, 50th Leg., Reg. Sess. (Wash. 1988). This Court described the changes to the statutory rape provisions as a "recodification." *See State v. Markle*, 118 Wn.2d 424, 430-31, 823 P.2d 1101 (1992).

In 1990, the legislature passed the Community Protection Act ("Act"), requiring any person who had been convicted of a sex offense to register as a sex offender. Laws of 1990, ch. 3, §402(1). The Act defined "sex offense" as any offense defined as such in the Sentencing Reform Act, and included "[a] felony that is a violation of chapter 9A.44 RCW." Laws of 1990, ch. 3, §402(5); former RCW 9.94A.030(29)(a) (1990).[3]

In 1999, the Legislature amended the definitional statute to provide that a "sex offense" also includes "any conviction for a felony offense *in effect at any time prior to July 1, 1976* that is comparable to a felony classified as a sex offense in (a) of this subsection." Laws of 1999, ch. 352, §8(33)(b); former RCW 9.94A.030(36)(b) (1999) (emphasis added).

The decisions in *Taylor* and *Wheeler* incorrectly interpreted the statutes at issue. *Taylor* relied on the 1999 amendment to RCW 9.94A.030

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(2) Rape of a child in the second degree is a class B felony.

Laws of 1988, ch. 145, § 3.

[3] The registration requirement was applicable to offenders who committed crimes after the effective date of the statute, and applied retroactively to offenders who were incarcerated or were under supervision when the statute became effective. Laws of 1990, ch. 3, § 402(5)(a) and (b).

for its holding that the plain language of RCW 9.94A.030's definition of "sex offense" applies only to offenses *currently* listed in chapter 9A.44 RCW, and therefore, does not apply to any previously codified "sex offenses" under 9A.44 RCW or former versions of the statute. 162 Wn. App. at 799.

As pointed out by Judge Lawrence-Berrey in *Arnold*, the flaw in the reasoning of both *Taylor* and *Wheeler*, is those courts' failure to recognize that the statutory rape laws were originally codified and in effect before July 1, 1976, and would, therefore, fit within former RCW 9.94A.030(36)(b) (1999), currently codified as RCW 9.94A.030(47)(b). 198 Wn. App. at 861. By failing to identify this nuance, the *Taylor* and *Wheeler* courts failed to give effect to all of the pertinent statutory language, creating a "loophole" in the statute. *Id*. If there was, at any time, a "loophole" which relieved individuals convicted of statutory rape from registration, that loophole was closed in 1999 when the legislature provided that individuals convicted of offenses existing prior to July 1, 1976, comparable to currently listed sex offenses, were required to register as sex offenders.

The crimes of second degree statutory rape and second degree rape of a child are comparable. The statutes punish nearly identical conduct. Mr. Arnold's conduct of engaging in sexual intercourse with a 12-year old when

he was 28-years old[4] meets the current definition of second degree child rape. Thus, under RCW 9.94A.030(47)(b), the defendant's conduct was a sex offense, and the legislature intended the defendant to register as such.

The judiciary is to discern the intent of the legislature, and give effect to the plain meaning of legislative enactments. In enacting the Community Protection Act, the legislature found:

> … that sex offenders often pose a high risk of re-offense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders register with local law enforcement agencies.

Laws of 1990, ch. 3, §401.

Taylor and *Wheeler's* incomplete analyses of the pertinent statutes frustrates the legislative intent by creating a clearly unintended loophole in the statutory scheme. Therefore, those decisions should be overturned by this Court.

3. Additional statutory support exists which undercuts the *Taylor* and *Wheeler* holdings.

When the legislature "decodified" the statutory rape laws and recodified them in 1979, it also added new sections to the code stating that

[4] *See* Attachment A to State's Response to PRP (Information).

former RCW 9.79.200 - .220 (Statutory Rape First, Second and Third Degree), although decodified and added to RCW 9A.44, "shall be construed as part of Title 9A RCW." Laws of 1979, 1st Ex. Sess., ch. 244, §§17-19. This language remains in effect today. RCW 9A.44.900 - .901. This would also indicate the legislature's intent that statutory rape offenses charged under RCW 9.79.200 - .220, be construed as if they were, and are, a part of Title 9A. The *Taylor* and *Wheeler* courts failed to read the statutes as continuations of each other or give effect to the legislature's intent under RCW 9A.44.900 - .901 that pre-1979 offenses be construed as part of Title 9A RCW.[5]

4. The *Taylor* and *Wheeler* courts' interpretation of the statutes leads to an absurd result by excluding statutory rape which has always been defined as a "sex offense".

Statutes are generally drafted in the present tense. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, §21:10 (6th ed. 2000). Each version of RCW 9.94A.030, even those in existence prior to the recodification of the statutory rape laws into the child rape laws, has been drafted in the present tense, providing that "a sex offense" means "a felony that *is a violation* of 9A.44 RCW." *See e.g.,* Former RCW 9.94A.030(23)

[5] *See also*, RCW 1.12.020 ("The provisions of a statute, so far as they are substantially the same as those of a statute existing at the time of their enactment, must be construed as *continuations* thereof"); RCW 1.12.028 ("If a statute refers to another statute of this state, the reference includes *any amendments* to the referenced statute unless a contrary intent is *clearly expressed*") (emphasis added).

(1986) (defining, for the first time, "sex offense," in part, as "a felony that *is* a violation of chapter 9A.44 RCW" (emphasis added)); Former RCW 9.94A.030(23) (1987); Former RCW 9.94A.030(29) (1990).

Under RCW 9.94A.030, as it existed in 1986 and 1987 (prior to the recodification of the statutory rape laws) statutory rape *was* a sex offense, as those crimes were defined in Title 9A RCW. If, as above, statutory rape offenses are to be construed as violations of RCW 9A.44 (RCW 9A.44.900 - .901), then, they too, should still be considered "sex offenses," especially in light of the fact that they were codified prior to July 1, 1976, and, therefore, also fall within former RCW 9.94A.030(36)(b) (1999), currently codified as RCW 9.94A.030(47)(b).

The *only* logical and reasonable interpretation of this statutory language is that the crimes of statutory rape as they existed prior to their renaming as child rape[6] *are* sex offenses for purposes of registration requirements. This view is consistent with the plain language of the statutes and the intent of the legislature.

B. THIS COURT SHOULD HOLD THAT THE WASHINGTON COURTS OF APPEALS IS TO GIVE DEFERENCE TO THE

[6] The only difference between statutory rape and rape of a child is that the former is phrased as a violation of a statute, and the latter as a violation of a person.

DECISIONS OF OTHER PANELS OF THE COURT BUT IS NOT STRICTLY BOUND BY HORIZONTAL STARE DECISIS.

1. Structure of Court of Appeals and RAP 13.4.

The Washington State Court of Appeals was created by an amendment to the Washington State Constitution in 1968. Wash. Const. Art. IV, §30. The Legislature established that the court would have three divisions. Laws of Wash. 1969, Ex. Sess., ch. 221, §2. Court of Appeals judges may sit in other divisions and causes may be transferred between divisions as directed by written order. *Id*. Thus, the Court of Appeals is one court. Wash. Const. Art. IV, §30 (establishing "a court of appeals").

This Court promulgated RAP 13.4. It provides the grounds upon which a party may seek review of a court of appeals decision in this Court. One of those grounds is that the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals. RAP 13.4(b)(2). Assuming that the Court of Appeals is, in fact, a "unitary" court, divided by regional districts, then such a conflict within the Court of Appeals may arise either within the same division, or from another division, i.e., the rule contemplates there may be both intra-division and inter-division conflict.

2. The Court of Appeals inconsistently applies the principle of horizontal stare decisis in its decisions.

Despite defendant's protestations that the divisions of the Court of Appeals have uniformly applied the same principle of stare decisis in their

decisions[7] (or can even agree upon what principle is to be used), those decisions belie the defendant's contentions. Even the panel of judges reviewing *Arnold* could not decide whether this Court's "incorrect and harmful" formulation of stare decisis applies to court of appeals decisions. *Arnold*, 198 Wn. App. at 853 ("According to the court in *Stalker*,[8] the appellate courts apply the same formulation of stare decisis as the Supreme Court. Accordingly, a prior appellate decision should not be rejected unless it is 'both incorrect and harmful'") (Pennell, J. concurring); *Id*. at 855 ("When it comes to whether our Supreme Court's 'incorrect and harmful' standard applies in this court, I agree with the reasoning of *Grisby v. Herzog*[9] that it does not… It is not inappropriate for this court to consider whether a previous opinion is incorrect and harmful in the course of deciding whether or not to follow it, but since we do not overrule prior decisions, 'it is not obligatory for this court to use … a standard developed by the highest state court for its own use in determining whether to overrule one of its own decisions'") (Siddoway, J. concurring).

After *Arnold* was decided, Division One disagreed with *Arnold's* assessment that it "is bound by horizontal stare decisis to the decisions of

[7] Answer to Motion for Discretionary Rev. at 2-3; Supplemental Br. at 1-5.

[8] *State v. Stalker*, 152 Wn. App. 805, 219 P.3d 722 (2009).

[9] *Grisby v. Herzog*, 190 Wn. App. 786, 808-09 & n.6, 362 P.3d 763 (2015).

[its] sister divisions," also citing *Grisby* for the proposition that "the doctrine of stare decisis does not preclude one panel from the court of appeals from stating a holding that is inconsistent with another panel within the same division."[10] *State v. Dennis*, 402 P.3d 943, 945 n.2 (2017).

The Court of Appeals has been less than consistent in its application of the principle of stare decisis. *See e.g. State v. Weatherwax*, 193 Wn. App. 667, 376 P.3d 1150 (2016) (Division Three sua sponte reaching "a different conclusion than was reached by Division One of our court in *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012)"); *State v. Larson*, 185 Wn. App. 903, 344 P.3d 244, *review granted*, 183 Wn.2d 1007, 352 P.3d 188 (2015), *and rev'd*, 184 Wn.2d 843, 365 P.3d 740 (2015) ("We are aware that the foregoing analysis is at odds with a recent Division Two decision, [*State v. Reeves*, 184 Wn. App. 154, 336 P.3d 105 (2014) (holding that "ordinary pliers" do not constitute a device designed to overcome security systems)]. We are not persuaded by that decision's reasoning"); *Little v. King*, 147 Wn. App. 883, 198 P.3d 525 (2009) ("Although, under the policy of stare decisis, we are exceedingly reluctant to disagree with recent opinions, we will do so if such an opinion 'is demonstrably "incorrect *or* harmful"'" (emphasis added)).

[10] Interestingly, Dennis urged Division One to follow a ruling from Division Two. *Dennis*, 402 P.3d at 945 n.2.

The lack of consistency in the Court of Appeals' application of stare decisis is troublesome for legal practitioners and ordinary citizens alike. Although few panels of the Court of Appeals have required briefing on the issue of stare decisis, *see, Grisby*, 190 Wn. App. at 808 n.5 (listing cases), if the principle *actually* applies to Court of Appeals' decisions, then the parties would necessarily need to brief the issue in order to obtain relief, i.e., as in this Court, a party must make "a clear showing" why the prior precedent is both incorrect and harmful, and therefore, should be abandoned. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016).

3. Federal and Other State Courts provide guidance for determining the extent to which the Court of Appeals may issue conflicting decisions.

Federal Circuit Courts of Appeal

Under the Federal System, comity among the Circuit Courts of Appeal is not a rule of law, but one of practice, convenience and expediency. Its goal is to secure uniformity of decision and discourage repeated litigation of the same question. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 20 S.Ct. 708, 44 L.Ed. 856 (1900). However, comity's deference to the opinion of another court is not imperative. The United States Supreme Court has weighed in on this issue, stating:

> If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares, not how a

> case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; *in a word, to decide them right.* In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals.

Id. at 488-489 (emphasis added).

Thus, the primary duty of the judiciary is to decide cases *correctly*. This stands in stark contrast to Judge Pennell's concurring opinion in *Arnold*, which would hold that "it may be better to be consistent than right." 198 Wn. App. at 855.

Additionally, the Circuit Courts of Appeal recognize their own autonomy, but still afford deference to the decisions of other courts of appeal, and acknowledge the desirability for harmonious decisions across the country. As explained by one court:

> As a general matter, we do not create conflicts among the circuits without strong cause. We adhere to this view because federal law (unlike state law) is supposed to be unitary. It would, of course, be foolhardy to suggest that we should blindly adhere to another circuit court's decision as a fail-safe method of preventing intercircuit conflict. Congress has created multiple and co-equal intermediate federal appellate courts, each with an equal power and duty to decide the cases properly brought before it. This regime, by design, embraces the possibility of a considered difference in views among the circuit courts on a given question; a policy of blind adherence to the decision of

> another circuit, apart from any utility it might have in promoting uniformity and predictability in outcome, would flout the manifest will of Congress. As then-Judge Ginsburg had occasion to observe in *In re Korean Air Lines Disaster*, "each [federal court] has an obligation to engage independently in reasoned analysis." 829 F.2d 1171, 1176 (D.C.Cir.1987), *aff'd*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989). At the same time, the interest that all prospective parties before the court have in uniformity and predictability of outcome must be given its due. We thus temper the independence of the analysis in which we engage by according great weight to the decisions of other circuits on the same question.

Washington Energy Co. v. United States, 94 F.3d 1557, 1561 (Fed. Cir. 1996). Yet, despite the circuit courts' recognition of the importance of comity, deference, and consistency, the federal system has been criticized for its failure to actually apply those principles in its appellate decisions, which results in reduction of uniformity of the law. *See*, Mark DeForrest, *In the Groove or In a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 Gonz. L. Rev. 455, 495 (2013).

Washington's Court of Appeals is dissimilar from the federal Circuit Court of Appeals, given that each division is not autonomous, and the court is unitary. But, the principles guiding federal comity may be workable among the divisions of the Washington court of appeals: each panel of judges must *correctly* decide the relevant issue, mindful that conflict should

not be created without strong cause, and tempered by deference to any previous opinions issued on the subject.

Other State Courts of Appeal

The California Court of Appeals is comprised of six districts in nine locations throughout the state.[11] Operating much like the federal system, California courts do not follow the principle of horizontal stare decisis. *See, e.g.*, *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 n.4, 235 Cal. Rptr. 396 (1987) (A "decision of a court of appeal is not binding. One district or division may refuse to follow a prior decision of a different district or division, for the same reasons the influence the federal Courts of Appeals of the various circuits to make independent decisions").

Indiana is also among the states that do not recognize stare decisis in its Court of Appeals.[12] *See e.g., In Re C.F.*, 911 N.E.2d 657, 658 (2009) ("This Court is respectful of the decisions of other panels and has so indicated in its previous decisions… [It] does not, however, recognize horizontal stare decisis. Thus, each panel of this Court has coequal authority on an issue and considers any previous decision by other panels but is not

[11] "The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions." Cal. Const. Art. 6, § 3; see also, *California Courts Overview*, available at http://www.courts.ca.gov/2113.htm (last accessed 10/23/17).

[12] "The Court of Appeals shall consist of as many geographic districts and sit as such locations as the General Assembly shall deem necessary." In. Const. Art. 7, § 5.

bound by those decisions"). Indiana's Appellate Rules, like Washington's, contemplate "diverse outcomes by panels" of the court, and provide its Supreme Court may accept transfer of a case where "conflicting decisions" exist. *Smith v. State*, 21 N.E.3d 121, 126 (2014); Ind. St. RAP 57(H).

Similarly, under Illinois law,[13] horizontal stare decisis "is not an inexorable command." *O'Casek v. Children's Home and Aid Soc.*, 229 Ill. 2d 421, 453 n.4, 892 N.E.2d 994 (2008) (Karmeier, J. dissenting).

> It is, instead, a recognition of the principle that our system of justice works best when the law does not change erratically, but rather, develops in a principled intelligent fashion…There is no question under Illinois law that courts may depart from their own precedent or the precedent established by a coequal court when they believe they have good cause or a compelling reason for doing so, e.g., where they believe the existing decisions are unworkable or badly reasoned.

Id.

The Oregon Court of Appeals, a statutorily created court,[14] claims adherence to the principle of stare decisis, which requires a showing that a decision is "plainly wrong." *See, e.g., State v. Civil*, 283 Or. App. 395, 406, 388 P.3d 1185 (2017). Oregon's "plainly wrong" requirement reflects that the court's "adherence to precedent is presumptive, not absolute. While we

[13] Illinois has one appellate court divided into districts, rather than multiple, autonomous appellate courts. *Renshaw v. General Telephone Co. of Illinois*, 112 Ill. App. 3d 58, 61, 445 N.E.2d 70 (1983).

[14] Or Const. Art. VII, § 1; O.R.S. § 2.510; O.R.S. § 2.540.

must not, and do not, 'lightly overrule' our precedents, including those construing statutes … we also recognize that … '[a]t the same time, *this court has an obligation to reach what we regard as a correct interpretation of statutes and rules.*'" *Id*. at 416 (emphasis added).

One division of the Washington Court of Appeals should not be bound by a sister division simply because the court is a "unitary court." Illinois and Indiana do not follow such a rule despite the fact that their Court of Appeals appear to be similarly structured to our State's court. Nor should Washington's court of appeals judges be constrained by the prior precedent of other judges when their "reasoned analysis" urges them to express a "considered difference in views."

Thus, this Court should adopt a rule applicable to the Court of Appeals that permits, although does not encourage, disagreement, for the primary purpose of ensuring that cases are decided correctly, and also for additional benefits that flow from the free exchange of diverse ideas among Washington's jurists. Such a policy will assist this Court in issuing its decisions – not only does disagreement in the Court of Appeals notify this Court of unsettled areas of the law in need of this Court's attention and clarification, but disagreement and diverse legal opinion can assist this Court in issuing its decisions by providing multiple perspectives on the same issue of law.

That is not to say that the Court of Appeals should not be expected to extend deference to the decisions of its other divisions or panels. Of course, stability and predictability are largely important in the law and for the public to maintain its confidence in the judiciary. But that does not necessarily require the Court of Appeals to abide by this Court's "incorrect and harmful" formulation of stare decisis before issuing a holding in disagreement with another panel of the court. Rather, the Court of Appeals should embrace that "considered difference in views" can be tempered by deference to the precedent of other panels of the court.

IV. CONCLUSION

Based upon the foregoing reasons, the State respectfully requests that this Court reverse the decision of the court below in *Arnold*, and overrule *Taylor* and *Wheeler* as incorrect. Additionally, the State requests that this Court hold that the Court of Appeals is not bound by horizontal stare decisis in its decisions, but rather, is bound to strive to correctly decide its cases while acting with considered deference to prior precedent.

Dated this 2 day of November, 2017.

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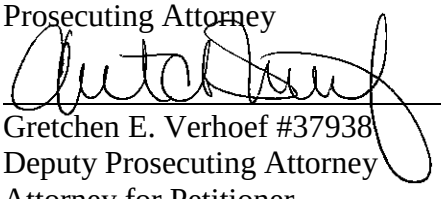

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on November 2, 2017, I emailed a copy of the Supplemental Brief of Petitioner in this matter, pursuant to agreement to:

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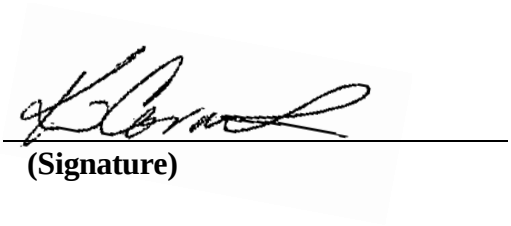
11/2/2017	Spokane, WA	
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SPOKANE COUNTY PROSECUTOR

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